90-1531

Supreme Court, U.S.
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No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

SOUTHEAST KANSAS COMMUNITY
ACTION PROGRAM,

Petitioner,

vs.

STATE OF KANSAS, ex rel.,
STANLEY C. GRANT, P.H.D.,
SECRETARY, KANSAS DEPARTMENT
OF HEALTH AND ENVIRONMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a state agency giving a subgrant to a local agency pursuant to Federal law and regulations, may force such local agency to give up rights established b Federal Regulation as a condition for permission to purchase equipment needed by such local agency to complete the project pursuant to the subgrant.

Does the decision of the Kansas Court of Appeals depart from extablished law to the extent that Petitioner was denied due process and equal protection.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Kansas Supreme Court are listed in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Southeast Kansas Community Action Program, Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Kansas entered in this proceeding on October 19, 1990.

OPINIONS BELOW

There are no official or unofficial reports of any opinions in the courts below. However, the non-published decision of the Kansas Court of Appeals and the decision on review by the Kansas Supreme Court are appended hereto. The decision of the Kansas Court of Appeals is appended hereto as Appendix A and the decision of the Kansas Supreme Court is appended hereto as Appendix B.

JURISDICTION

The judgment of the Kansas Court of

Appeals herein was entered on October 19, 1990. A timely Petition for Review to the Kansas Supreme Court was filed and this Petition for Review was denied on December 18, 1990. Jurisdiction is in this Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLED

This case arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> **"Section 1. Citizenship; privileges or immunities; due process clause.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" U.S.C.A., Constitution, Amendment XIV.

Additional, relevant federal

regulations are as follows:
7 C.F.R. 246.24(d). "State and local agencies shall observe standards prescribed at 7 C.F.R. 3015 in the utilization and disposition of real property and equipment including automated data processing equipment acquired in whole or in part with program funds."

7 C.F.R. 3015.162. "Subject to obligations and conditions specified in this subpart, title to real property, equipment, and supplies acquired under a grant or subgrant shall vest, upon acquisition, in the recipient or subrecipient respectively. In certain cases, money due the federal government upon disposition of real property may be authorized to be used for allowable costs rather than paid to U.S.D.A." (Emphasis added.)

Appendix A to 7 C.F.R. part 3015. "'Subgrant' means an award of money, or property instead of money, which: (1) Is made under a grant or cooperative agreement by the recipient of the grant or cooperative agreement; and (2) Is made principally to accomplish a purpose of support of stimulation rather than to establish a buyer-seller relationship between the two parties. Any award which meets that definition is a subgrant even if the parties to the award use some other label such as 'grant,' 'agreement,' 'cooperative agreement,' 'contract,' 'allotment,'

or 'delegation agreement.' Also, if the award meets that definition, it is a subgrant whether or not the awarding agency is expected to be substantially involved in its performance. However, the term 'subgrant' does not include any type of assistance which is excluded from the definitions of 'grant' and 'cooperative agreement' by Section I(c) of this Appendix."

7 C.F.R. 3015.165(a). "The awarding agency shall have the right to require the transfer of equipment (including title) for items of equipment having unit cost of $1,000.00 or more to the federal government or to an eligible nonfederal party named by the awarding agency. Normally, U.S.D.A. agencies shall only exercise this right if the project or program for which the equipment was acquired is transferred from one recipient to another. The following conditions shall govern this right:

(1) The property shall be appropriately identified in the grant award.

(2) In order for the awarding agency to exercise this right, disposition instructions must be issued no later than 120 days after the end of the U.S.D.A. grant support for the project or program for which the equipment was acquired.

Furthermore:

(i) If the equipment is eligible for exemptions in 3015.164 and ceases to be needed for the project or program for which it was acquired while the project or program is still being

performed by the recipient, the disposition instructions must have been received by the recipient while the equipment was still needed for the project or program.
(ii) If the equipment is not eligible for those exemptions, disposition instructions must have been received by the recipient before other permissible disposition of equipment took place in accordance with subsection 3015.168.
(iii) If the right is exercised, the recipient shall be entitled to be paid any reasonable, resulting shipping or storage costs incurred, plus an amount computed by multiplying the market value of the equipment by the non-Federal share of the equipment." (Emphasis added.)

7 C.F.R. 3015.165(b). "(b) Right of parties awarding subgrants. A recipient may reserve for itself, when awarding a subgrant, rights similar to those found in paragraph (a) of this section which covers items of equipment having a unit acquisition cost of $1,000 or more which are acquired under that subgrant. Without approval of the awarding agency, the right may be exercised only if the project or program for which the equipment was acquired is transferred to another subrecipient and only for the purpose of transferring the equipment to the new subrecipient for continued use in the project or program." (Emphasis added.)

7 C.F.R. 3015.166(c). "(c) Use by other recipients. When the recipient can no longer use the equipment as required by paragraph (a) of this section, it may voluntarily make the equipment available for use on projects or programs currently or previously funded by the Federal government which the recipient is supporting through sub-grants or through non-Federal grants. A subrecipient may also voluntarily make the equipment available for use in projects or programs currently or previously funded by the Federal government which are being conducted or supported by the recipient." (Emphasis added.)

STATEMENT OF THE CASE

Until October 1, 1988, the Southeast Kansas Community Action Program, Incorporated (SEK-CAP), operated the Womens, Infants and Childrens Supplemental Food Program (WIC or WIC program), established pursuant to 42 U.S.C. 1786(a), in Southeast Kansas. This program is implemented through federal grants to state agencies which in turn make subgrants to local agencies to provide services. 42

U.S.C. 1786(c). In this case, the state agency is the Kansas Department of Health and Environment (KDHE). It is undisputed that KDHE gave SEK-CAP a subgrant to operate the program in several Southeast Kansas counties.

SEK-CAP is a Kansas, not-for-profit corporation and is also a designated community action agency for the purpose of receiving funds from the Federal Department of Health and Human Services through the Kansas Department of Social and Rehabilitation Services. See 42 U.S.C. 9901, et seq.

On October 1, 1988, KDHE awarded the Labette County Health Department the grant to administer the WIC program in Southeast Kansas, ending SEK-CAP's long-term operation of the program. This litigation followed.

This case was initially filed as a

petition for a temporary restraining order on October 19, 1988, by KDHE. (ROA, Vol. I at 2.) Such restraining order was entered on October 19, 1988, after a proceeding in which no evidentiary hearing was held. (ROA, vol. I at 5 and 6.) SEK-CAP answered the original petition on November 17, 1988. (ROA, Vol. I at 7 to 12.) On December 7, 1988, the origianl petition for a temporary restraining order was amended to add a prayer for the return of goods allegedly belonging to KDHE. (repleven action) (ROA, vol I at 14 and 15.) SEK-CAP answered the petition on December 27, 1988, and filed several counterclaims (ROA, Vol. I at 19 to 22.) SEK-CAP's counterclaims included a claim for quiet title to the equipment in question, a claim that KDHE failed to follow federal regulations and contractual obligations when it did not renew SEK-CAP's agreement to operate the

WIC program in southeast Kansas, and a claim that KDHE did not pay SEK-CAP money due under its contract. Id. On December 28, 1988, after an evidentiary hearing which was conducted December 7, 1988, the District Court of Crawford County denied KDHE's motion for a temporary injunction and vacated the restraining order. KDHE answered SEK-CAP's counterclaims on January 11, 1989. (ROA, Vol. I at 24.)

The only issue presented here concerns the title to equipment which SEK-CAP purchased under its WIC program sub-grant from KDHE. This was the subject of the replevin action by KDHE and the SEK-CAP quiet title action. The District Court of Crawford County, Kansas, entered a decision granting KDHE the equipment. This result was upheld by the Kansas Court of Appeals and review was denied by the Kansas Supreme Court.

In this case, it is beyond dispute that KDHE received a grant from the U.S. Department of Agriculture (USDA) to operate the WIC program state wide and that it made a sub-grant to SEK-CAP to operate the program in southeast Kansas. There is also no dispute that the equipment in question was purchased with federal WIC funds sub-granted to SEK-CAP by KDHE.

There should be no dispute that the ownership of the equipment in question must be determined by the Federal regulation set forth herein. However, KDHE and the courts below have ignored these regulations with impunity.

Since the equipment in question was purchased by SEK-CAP when it was a subrecipient under a subgrant from KDHE, the regulations clearly demonstrate that title to the subject property was vested in SEK-CAP. (See 7 C.F.R. 3Ø15.162.) These

provisions supercede any inconsistent state law or regulations which may be cited by KDHE. Rural Gas Inc. v North Central Kansas P.C.A., 243 Kan. 109 (1988).

The only restrictions on SEK-CAP's continued use and ownership of the equipment in question are found at 7 C.F.R. 3015.165.

Here, USDA reserved the right to require transfer of equipment having a value of $1,000.00 or more. (See 7 C.F.R. 3015.165(a).) It is undisputed that USDA never exercised this right within the regulatory 120 day period.

Also, under 7 C.F.R. 3015.165(b), a recipient (KDHE) also has limited rights to tranfer property in the hands of subrecipients (SEK-CAP). However, this regulation only applies to property having a cost of $1,000.00 or more. Further, the

reservation of rights must be made "when awarding the subgrant" and not at some later time. It is undisputed that KDHE did not reserve any rights pursuant to 7 C.F.R. 3015.165(b) when the subgrant was made.

KDHE has argued, under this provision, that it reserved the right to require transfer of the equipment in question to the Labette County Health Department because it required that SEK-CAP agree before the purchase of needed equipment to a stipulation that such equipment be used "100% for WIC". KDHE had admitted at trial that this was a contract of adhesion. SEK-CAP could not have purchased the needed equipment without such agreement. (ROA, Vol. II, Transcript at 40.)

It is undisputed that the property in question had, with one exception, an acquisition cost of $1,000.00 or less. The only property having an acquisition cost of

$1,000.00 or more was a van. By its own terms the regulation would only cover the van.

The evidence at trial showed that SEK-CAP's Exhibits 1 and 2 (see ROA, Vol. II, Defendant's Exhibits 1 and 2, letters of approval to buy the van in dispute) contain no language that the van is to be used "100% for WIC". Further, undisputed testimony was that all of the other equipment which was demanded by KDHE had an acquisition cost of less than $1,000.00. (ROA, Vol. II, Transcript at page 262.) There was no evidence at trial that KDHE reserved the right to transfer the equipment in question to another entity other than approval letter language that equipment should be used "100% for WIC" in some of the purchase authorization letters.

The facts establish beyond doubt that

KDHE did not own the equipment. First, the 100% for WIC requirement was not a reservation which was made at the time the subgrant was awarded as required by the regulations. It was made later at the time of purhcase of the property. Second, the language involved, "100% for WIC", is not a clear reservation of the right to transfer the equipment. Third, KDHE's right to transfer is limited to equipment having an acquisition cost of $1,000.00 or more. All of the equipment, except the van, had an acquisition cost of less than $1,000.00. Fourth, the letter authorizing the purchase of the van was admitted into evidence and contained no "100% for WIC requirement". It stated as follows:

"August 30, 1982

Vallajean Younger
WIC Coordinator
SEK-CAP, Inc.
Box 128
Girard, KS 66743

Dear Val:

This letter is to approve your request to purchase a vehicle for the SEK-CAP WIC program. Enclosed is a copy of the response from USDA.

Please note that the following must be done in regards to the purchase:

1. Requirements of OMB Circular A-102 must be complied with. If you do not have a copy of this, please contact this office.

2. The purchase must be made prior to September 30, 1982, as the funds to be expended are FY 82.

3. It will be necessary to revise your three month State contract. This will soon follow.

4. The purchase must be reported on your monthly affidavit with all supporting documentation.

If you have any questions regarding the purchase requirements, please contact this office.

Sincerely,
Sarah E. Harding, M.S., R.D.
State WIC Coordinator
BUREAU OF MATERNAL AND CHILD HEALTH
SEH:cd
Enclosure
cc: Terry Simmons"

(ROA, Vol. II, Exhibits, Defendant's Exhibit 1.)

In short, KDHE established no claim to the equipment in question under the federal regulations.

At trial, testimony indicated that the subject equipment was being used by SEK-CAP in its other federal programs, and there was no evidence that SEK-CAP desired to voluntarily make the equipment in question available to KDHE or the Labette County Health Department. (ROA, Vol. II, Transcript at pages 49 and 50.)

In reaching the result that the equipment in question was the property of KDHE, the District Court of Crawford County, Kansas, appears to have found that KDHE varied the terms of the regulation in question when it placed the "100% for WIC" language in various letters. (ROA, Vol. I at 45.) The District Court of Crawford County states that SEK-CAP and KDHE agreed that the property was to be used for WIC

only and that KDHE had regulatory authority to do this pursuant to 7 C.F.R. 3Ø15.164. This regulation, however, is not even applicable. It applies only where "certain federal statutes" allow title to vest in a recipient (KDHE). 7 C.F.R. 3Ø15.164(a). It also states it is only where the equipment is subject to a "statute of that kind" that it shall be exempt from the requirements of 7 C.F.R. 3Ø15.165. Here, there is no evidence of a federal statute which would exempt the property in question from the provisions of 7 C.F.R. 3Ø15.165. No argument was made to that effect either before or during trial.

More relevent here, the Court of Appeals adopted a different approach from that of the District Court of Crawford County. The Court of Appeals stated as follows:

"The trial court found factually that each time SEK-CAP purchased property under the contract the parties agreed it would be used solely for the WIC program and further found that the parties modified their original agreement so title to all purchased property would remain with KDHE for continued use in the state's WIC program.

Parties may agree to modify a contract term and the intent to do so may be implied from the parties' conduct. See Byers Transp. Co. v. Fourth Nat. Bank & Trust Co., Wichita, 333 F.2d 822, 825 (10th Cir. 1964). Whether a term of a contract has been modified is a question of fact. Belger Cartage Serv., Inc. v. Holland Constr. Co., 224 Kan. 320, 330, 582 P.2d 1111 (1978). The trial court's factual findings will not be disturbed on appeal if supported by substantial competent evidence. Williams Telecommunications Co. v. Gragg, 242 Kan. 675, 676, 750 P.2d 398 (1988).

In the present case, SEK-CAP placed state inventory stickers on the equipment and, when notified of KDHE's intention not to renew the contract, SEK-CAP did return some of the purchased property to KDHE. Further, after KDHE requested the return of the property, SEK-CAP originally claimed the property was retained under its right of setoff for the debt it was owed, and did not claim title pursuant to the parties' contract. There was substantial competent evidence to

support the trial court's factual findings."

Thus, the Court of Appeals abandoned the rationale that a regulation permitted KDHE to force SEK-CAP to give up title to the equipment as a condition of purchase. Instead the Court of Appeals merely states that the contract modification was made. The Court of Appeals does not address the issue of whether KDHE had the authority to violate the provisions of 7 C.F.R. part 3015 and nor does the Court of Appeals address the "contract of adhesion" issue. Both of these issues were raised throughout this litigation.

REASONS FOR ALLOWING THE WRIT

1. The Supreme Court of the United States should exercise its supervisory power to assure that the letter and spirit of Federal Regulations are complied with by State agencies and followed by Courts

of the State of Kansas. This is an important question.

In a nutshell, KDHE sought to subvert federal program requirements by forcing SEK-CAP to give up a property right created by federal regulations as a precondition to being able to purchase equipment needed to accomplish the WIC program in Southeast Kansas.

In this case, equipment purchased by SEK-CAP to operate the WIC program in southeast Kansas belonged to it, subject only to the federal government's right to request transfer. The federal government did not exercise that right. KDHE did not reserve the right to transfer equipment as required by the regulations and, in any event, KDHE could not have reserved the right to transfer equipment having an acquisition cost of $1,000.00 or less. With the exception of the van, all of the

equipment awarded to KDHE by the Court of Appeals has a value of less than $1,000.00.

Moreover, KDHE admits that SEK-CAP could not have gotten permission to buy the needed equipment if it had not agreed to the "100% for WIC" requirement. This clearly violated federal regulations. The evidence is also clear that the 100% for WIC requirement was not made at the time of the subgrant but at a later time prior to the purchase of needed equipment.

KDHE is bound to follow federal law when operating federal programs. Federal regulations are the supreme law of the land and supercede all inconsistent state law. Rural Gas, Inc. v. North Central Kan. P.C.A., 243 Kan. 109 (1988).

SEK-CAP submits that KDHE could not have legally acquired title or any other right respecting the the equipment in

question by forcing SEK-CAP to give up its rights in the equipment as a condition for its purchase.

Acceptance of this subversion of federal regulations by KDHE, which was condoned by the courts below, is a signal that federal regulations governing program and property rights are meaningless. If federal regulations are ignored by state agencies bound to enforce them and if our courts do not force compliance, the state itself is in default on its obligations to the federal government which granted it funds and the state is operating outside the law.

The importance of making clear that state agencies must follow federal regulations controlling the programs they administer can not be gainsaid. The principal is obvious on its face. This is true whether state agencies directly

violate the regulations or intentionally subvert them.

Here, it is undisputed that pertinent federal regulations found at 7 C.F.R. part 246 and 7 C.F.R. part 3015 and set forth above are contractually binding between the parties and govern the rights of the parties herein. Moreover, KDHE has conceded that SEK-CAP is a third party beneficiary of KDHE's contract with the Department of Agriculture to administer the WIC program in conformity with these regulations and that the program must be administered in conformity with such regulations. (ROA, Vol, I at 20, paragraphs 6, 7 and 8, and 24, paragraph 1; Vol. II, Transcript at page 77.) Finally, even if such regulations are not contractual, they are federal law, binding on the parties and supercede all inconsistent state law. Rural Gas, Inc.

v. North Central Kan. P.C.A., 243 Kan. 109 (1988). The regulations were paramount authority in determining the title to the subject equipment, and they were subverted by KDHE and ignored by the courts below.

The issue of adherance to statutory and regulatory requirements is an important issue in the face of the diminishing federal role in administering federally funded programs. Over the last ten years many federal programs which involved direct grants from the federal government to local agencies are now being "block granted" to states. See e.g. Cappalli, Federal Grants and Coop Agreements, section 133 et seq. However, each of these block grants has some "strings" attached which require states to comply with statutory and regulatory directives. In many cases, such regulations create protected rights in participants and subgrantees.

In this case, federal regulations created a property right in SEK-CAP. Subject to regulatory requirements, SEK-CAP had absolute title to all equipment with a value of less than $1,000.00 and title to the van subject to USDA's right to transfer which was not exercised.

The argument of KDHE was that they could require SEK-CAP to give up this property right as a pre-condition before SEK-CAP could purchase equipment needed to operate the grant. This means that KDHE, as a matter of policy, sought to subvert federal grant requirements.

Rather than to acknowledge this default and enforce the law, the courts below simply ignore the regulation allowing KDHE to take property which belonged to SEK-CAP. The reasoning of the Kansas Court of Appeals is so defective that it violates SEK-CAP's due process and

equal protection rights.

If this decision is allowed to stand, then agencies of this state and other states can simply ignore federal laws which create enforceable property rights, simply by requiring waver of such rights as a condition for receiving federally funded benefits.

SEK-CAP is aware that the total amount in dispute here is small. However, the principal involved is a fundamental one. It concerns the basic structure of the federal/state/local assistance system now operative in this country. It is therefore important that this Court address and resolve the issues presented by this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 64,610

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS ex rel.,
STANLEY C. GRANT, Ph.D.,
Secretary, and KANSAS DEPARTMENT
OF HEALTH AND ENVIRONMENT,
Appellees,

v.

SOUTHEAST KANSAS COMMUNITY
ACTION PROBRAM, INC.,
Appellant.

MEMORANDUM OPINION

Appeal from Crawford District Court; RICHARD D. LOFFSWOLD, judge. Opinion filed October 19, 1990. Affirmed.

William E. Metcalf, of Metcalf and Justus, of Topeka, for appellant.

Marvin G. Stottlemire, of Kansas Department of Health and Environment, for appellees.

Before GERNON, P.J., ELLIOT, J., AND

TERRY L. BULLOCK, District Judge, assigned.

Per Curiam: Southeast Kansas Community Action Program (SEK-CAP) appeals the trial court's decision concerning title to personal property and denial of its request for prejudgment interest.

We affirm. The facts will be detailed only as necessary in deciding the issues.

SEK-CAP contracted with the Kansas Department of Health and Environment (KDHE) to administer the federally funded Women, Infant and Children's Program (WIC) in several southeast Kansas counties. Eventually, KDHE notified SEK-CAP it would not renew the contract and informed SEK-CAP it would receive instructions as to the transfer of equipment, supplies, and the like. SEK-CAP returned some property but retained most of it and this lawsuit followed.

The trial court found factually that

each time SEK-CAP purchased property under the contract the parties agreed it would be used solely for the WIC program and further found that the parties modified their original agreement so title to all purchased property would remain with KDHE for continued use in the state's WIC program.

Parties may agree to modify a contract term and the intent to do so may be implied from the parties' conduct. See Byers Transp. Co. v. Fourth Nat. Bank & Trust Co., Wichita, 333 F.2d 822, 825 (10th Cir. 1964). Whether a term of a contract has been modified is a question of fact. Belger Cartage Serv., Inc. v. Holland Constr. Co., 224 Kan. 320, 330, 582 P.2d 1111 (1978). The trial court's factual findings will not be disturbed on appeal if supported by substantial competent evidence. Willams

Telecommunications Co. v. Gragg, 242 Kan. 675, 676, 750 P.2d 398 (1988).

In the present case, SEK-CAP placed state inventory stickers on the equipment and, when notified of KDHE's intention not to renew the contract, SEK-CAP did not return some of the purchased property to KDHE. Further, after KDHE requested the return of the property, SEK-CAP originally claimed the property was retained under its right of setoff for the debt is was owed, and did not claim title pursuant to the parties' contract. There was substantial competent evidence to support the trial court's factual findings.

SEK-CAP also claims the trial court erred in refusing to award prejudgment interest. As the case went to trial, SEK-CAP's counterclaim asserted it was owed some $17,000, while KDHE contended some $13,000 was due. Obviously, the amount

owed SEK-CAP was not "liquidated" at trial time, since both the amount due under the contract and the date upon which it was due were disputed at that time. The trial court found as a fact the $13,000 figure was owed. See Plains Resources, Inc. v. Gable, 235 Kan. 580, 682 P.2d 653 (1984). Unliquidated claims do not ordinarily draw prejudgment interest. See Holmes v. Kewanee Oil Co., 233 Kan. 544, 553, 664 P.2d 1335 (1983), cert. denied 474 U.S. 953 (1985).

The trial court did not err in denying prejudgment interest.

Finally, SEK-CAP argues the trial court erred in dismissing count 2 of its counterclaim. The trial court dismissed without prejudice count 2 based on a finding it was identical with relief being sought in a federal court case which apparently is still pending.

SEK-CAP has not provided us with a copy of its federal court complaint in the record on appeal, so we are somewhat hampered in deciding this issue. See Eisenhut v. Steadman, 13 Kan. App. 2d 220, 223, 767 P.2d 293 (1989); Dickinson, Inc. v. Balcor Income Properties Ltd., 12 Kan. App. 2d 395, 399, 745 P.2d 1120 (1987).

In any event, the trial court certainly had the discretionary power to stay count 2 of SEK-CAP's counterclaim. See Henry, Administrator v. Stewart, 203 Kan. 289, 292-93, 454 P.2d 7 (1969). On the other hand, a party may not, as a matter of right, have an action dismissed simply because a similar suit is pending in federal court. See Farmers Union Cooperative Elevator v. Grain Dealers Mut. Ins. Co., 194 Kan. 181, Syllabus 1, 398 P.2d 571 (1965).

In the present case, the trial court

dismissed count 2 of the counterclaim without prejudice, and at oral argument counsel for KDHE recognized that SEK-CAP could refile its claim. The trial court did not abuse its judicial discretion.

Affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF KANSAS

State of Kansas, ex rel. Stanley C. Grant, P.H.D. Secretary, Kansas Department of Health and Environment, Appellee	)	
v.	)	No. 89-64610-A
Southeast Kansas Community Action Program, Inc., Appellant	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date December 18, 1990